United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-7438

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IN THE

United States Court of Appeals
For the Second Circuit

No. 76-7438

FEDERAL DEPOSIT INSURANCE CORPORATION,
as Receiver of Franklin National Bank,
Plaintiff-Appellee,

against

JEAN M. GRELLA, LAWRENCE LEVER, and
LEVER HOLDING CORP.
Defendants,

JEAN M. GRELLA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT

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I N D E X

I N D E X

Page

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

TABLE OF CASES

STATUTES CITED

UNITED STATES COURT OF APPEALS

For the Second Circuit

FEDERAL DEPOSIT INSURANCE COMPANY, as Receiver of Franklin National Bank,

Plaintiff-Appellee

v.

JEAN M. GRELLA, LAWRENCE LEVER and LEVER HOLDING CORP.,

Defendants

JEAN M. GRELLA,

Defendant-Appellant

Brief of Defendant-Appellant

Issues Presented for Review

In a declaratory judgment action, and by summary judgment on motion of Federal Deposit Insurance Corporation as receiver of the defunct Franklin National Bank, the district court has permanently enjoined the landlord of a ground lease (not part of the assets of

Franklin) from enforcing her claimed rights under that lease. As an incident of its judgment, the court intrepreted the lease and adjudicated the rights of the parties to it.

The justification asserted for this extraordinary exercise of the powers of the federal court is "public policy considerations",

> "Although FDIC has parted with ownership of the ground lease, it is concerned to prevent termination of the lease because of public policy considerations. It urges that it must be able to assure continuation of the opportunity to provide banking facilities at specific locations in order to induce a healthy bank to buy the assets of an insolvent bank which is one of the methods by which it preserves the assets of insolvent banks."
> (Opinion below, A-87,88)*

The provision of banking facilities referred to is under a lease of a branch office by defendant Lever to Franklin National Bank and not under the ground lease.

The issues presented for review are:

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*All references are to pages in appendix unless otherwise noted.

1. Did the receiver have standing to sue for the relief demanded?

2. Was there a ripe controversy existing between the receiver and Grella presenting for determination a substantial federal question?

3. Did the court have subject matter jurisdiction?

4. Was the declaratory judgment correct, and the permanent injunction properly granted?

Statement of the Case

The decision below was rendered on June 16, 1976 by Hon. Orrin G. Judd. It is in the appendix at p. A.80. It has not so far been reported.

The action was brought by FDIC as receiver of Franklin National Bank for a judgment declaring that a ground lease made by defendant Grella (not part of the assets of the receivership) was in full force and effect, and permanently enjoining her from enforcing her rights resulting from a claimed breach of the lease.

A pendente lite injunction was applied for. Grella opposed the application, and moved to dismiss the complaint. The temporary injunction was granted and the motion to dismiss was denied. Grella answered putting in issue the complaint. The plaintiff then moved for summary judgment, which was granted, and a permanent injunction awarded to FDIC as receiver.

The Facts

The defendant-appellant Grella, a widow and unsophiscated housewife, owns a parcel of real estate on the north side of Old Country Road in Mineola, on which she formerly lived and operated a diner. (A42) In the early part of 1961, she was approached by Franklin National Bank of Long Island (subsequently Franklin National Bank) with a proposal for a ground lease of the property. She signed a binder for the deal (A43), and subsequently on April 4, 1961, executed a ground lease of the property to Franklin. (A44) The binder and the lease were prepared by Franklin, and the lease is in the legal back of its then counsel. (A43,44,54). The binder provided that the bank should

demolish the existing structures. By a separately signed addendum, the bank was to "have the right to construct such building or buildings as it may desire", and also the right to assign or sublet without the landlord's consent "but shall, of course, continue to remain liable for the rent and all of the other obligations on the part of the tenant". (A40)

The lease included provisions giving the tenant the unrestricted right to assign or sublet without the landlord's consent, and to demolish and construct (A-10). Franklin first sublet the ground leased premises to defendant Lever, who later surrendered the sublease to Franklin. Franklin, on December 28, 1964, assigned the ground lease to Mineola Office Building, Inc. (one of Lever's corporations), and after several other transactions the ground lease was assigned to Lever. (A1-a,2,25)

Franklin parted forever with all interest in the ground lease and the ground-leased premises by the absolute assignment of the ground lease to Mineola

Office Building, Inc. in 1964. When Lever was sub-lessee of the ground leased premises, he did not assume the obligations of the ground lease. When the ground lease was assigned to Mineola Office Building, that corporation did not assume the ground lease, nor did any of the subsequent assignees. In each assignment, the assignee took "subject to the rents, covenants, conditions and provisions" of the ground lease. To this moment, no one is contractually liable to Grella on the ground lease except the defunct Franklin. (A47,62)

Subsequent to the assignment of the ground lease to Lever, he leased to Franklin a branch banking office in the building which he erected on the ground-leased premises. (A2,78). This is referred to in the complaint and other papers of the plaintiff as a "sub-lease". It is not. A sub-lease would have to relate to all or part of the ground-leased premises for part of the lease term. Lever gave Franklin no lease or sub-lease of the ground. He gave it a lease only of space in the building just as he leased space

to all his other tenants in the building. None of them is a sub-lessee of the ground, and none of them (including F.N.B) has any interest in the ground.

On October 8, 1974, Franklin was declared insolvent by the Comptroller of the Currency, and the Federal Deposit Insurance Corporation was appointed its receiver, as required by 12 U.S.C. 1821(C). (A3)

After Franklin was declared insolvent, Grella served a notice to terminate the ground lease under the right given her by the terms of paragraph "10" of the lease.

This action was then brought by F.D.I.C. as receiver of F.N.B. for a declaratory judgment and an injunction restraining Grella from pursuing her rights under the ground lease. The permanent injunction requested was granted by summary judgment.

The court below by its determination has necessarily found (as Grella has always contended), that the tenant referred to in the termination article

of the lease is Franklin National Bank. F.N.B. is as dead as last year's snow. Yet the court has held that because the precise method of F.N.B.'s demise was not particularized in the lease, the indisputable fact of its total insolvency must be ignored, and Grella restrained from exercising her rights under the lease, although the defunct bank is the only entity contractually liable to her.

Oddly enough, no injunction was sought against Lever who is the landlord of the branch banking office, although his lease prevents an assignment by the receiver to its licensee European-American without his consent. He has indicated he "might" agree to it, but has expressed subsequent reservations. (A-79)

Point I

The declaratory judgment construing the ground lease should not have been rendered, and the permanent injunction should not have been granted because: (a) the plaintiff as receiver lacked standing to sue (b) there was no case or controversy between the receiver and defendant Grella (c) the court lacked subject-matter jurisdiction.

The F.D.I.C. as receiver of the defunct Franklin National Bank brought this action for a declaratory judgment:

> "(a) declaring that Grella's notice of termination of the Ground Lease is null and void and of no force or effect whatever;
>
> (b) declaring that the Ground Lease continues in full force and effect;" (A-7)

The receiver also asked for and obtained a temporary and permanent injunction

> "enjoining Grella, her agents, servants, employees, attorneys, all persons under their control, direction, permission, or license, and all persons in active concert or participation with them or any of them, from
>
> (i) terminating the Ground Lease on the basis of the declaration by the Comptroller of the Currency of the United States that FNB was insolvent and the appointment of FDIC as Receiver of FNB pursuant to 12 U.S.C. §§191 and 1821(c);
>
> (ii) reentering the leased premises and repossessing the Ground and Lever's Building by any means, including summary proceedings or force, so long as the Ground Lease is in effect." (A-7,101)

By her answer, the defendant Grella raised the defenses that the plaintiff had no standing to bring

this suit, that the ground lease is no part of the assets of the defunct Franklin National Bank, that there is no present case or controversy between the receiver and Grella, and that the complaint failed to state a claim for which relief might be granted. (A-19,20,21)

The receiver moved for summary judgment declaring the rights between the defendant Grella and the defendant Lever in the ground lease (in which neither the F.D.I.C. nor its insolvent FNB has any interest whatever), and permanently enjoining Grella from pursuing her legal rights and remedies under the ground lease against Lever. (A22)

The receiver asked the court to construe the ground-lease on the basis that the termination clause is not ambiguous, and that none of the events of default recited in it have occurred with respect to F.N.B. It urged that the court had jurisdiction to determine the meaning of a non-ambiguous contract as a matter of law, and the court below has so found. The argument is correct as a general statement of the

law on summary judgment, but it completely by-passes the question of the jurisdiction of the court to make any determination over the lease here presented. Questions of construction are not decided in a vacuum. There must be a writing properly before the court and within its jurisdiction for construction. That state of facts is missing here.

> The receiver had no standing to sue for a declaration of rights under a lease which was not part of the insolvent estate, and the court lacked jurisdiction to pass on it.

Franklin National Bank parted absolutely and forever with all its rights as tenant under the ground lease over ten years ago. No rights under the ground lease were assets of the F.N.B. at the time of its insolvency, and none passed to FDIC as its receiver. All that passed to the receiver were the rights of FNB under a branch office lease from Lever. Yet the receiver presumed to ask an adjudication of the rights of Grella and Lever under the ground lease. The receiver apparently bottomed its request for this extraordinary relief on the grounds that if the insol-

vency of FNB was a default under the ground lease, the transfer of the branch office in the building to the receiver's licensee European American Bank would fall through, and as a result the receiver might have to close up the branch bank. This may be true and unfortunate, but how could that circumstance confer standing on the receiver to sue for, or jurisdiction on the court to make, a determination of the rights of the parties to the ground lease in which the receiver had no interest whatever? This is not a bankruptcy, nor a reorganization, nor even an equity receivership, but if it were any of those, the court would have no jurisdiction to make an adjudication with respect to a lease which was not in some way part of the insolvent's estate.

Callaway v. Benton, 336 U.S. 132,142,143,144
69 S.Ct. 435, 441, 442

In re South Jersey Land Corp.
361 F 2d 610, 613

In re Penn Central Trans. Co.
468 F 2d 1222, 1225

In re Beck Industries, Inc.
479 F 2d 416

Parkview-Gem Inc. v. Stein, 516 F2d 807,809,810

In Parkview, above, where the facts matched those here, the Court said in 516 F 2d at p. 810:

> "Since the debtor was not the owner of the lease and the Trustee had neither actual nor constructive possession of the rights conferred by the lease, the court was without jurisdiction to enjoin respondents from instituting proceedings to terminate the lease owned by the subsidiary".

The court below brushed aside this apparently insuperable obstacle to its jurisdiction on two grounds:

(1) "If the FDIC is still the tenant under the ground lease, then it is liable, either as receiver or in its corporate capacity, as successor to Franklin for future payments under Article 15 of the ground lease in spite of Grella's termination of the lease. That fact gives FDIC an interest in the question, even if Grella has not yet filed a claim with the receiver". (A-89)

We do not agree that Grella would have any claim against F.N.B. for future rent. She has asserted no such claim, and the assumption that she might do so is the purest speculation. But aside from that, there is not a word in the complaint or in any

of the moving papers below alleging the speculative possible claim as a justification for the receiver's action, or its standing to sue, or urging the existence of the possible claim against the insolvent's estate as presenting a controversy with Grella.

On the contrary, the complaint and the supporting papers in support of this motion, show that the receiver's concern was always and only about the defendant Lever and the receiver's licensee European-American Bank, and their supposed hardships, and not with any possible claim by Grella against the insolvent's estate, or any alleged interest the insolvent bank had in the ground lease. (A4,5,6,51). Nowhere in the complaint, or in any of those papers, is there an allegation that Franklin National Bank had any interest in, or could make any claim against defendant Grella on the ground lease,or that she could make a claim against F.N.B. based on it.

2. The other ground advanced by the court as giving the plaintiff standing and the court

jurisdiction was:

> "The Grella memorandum also overlooks the special character of FDIC as a Federal agency. FDIC has a legitimate public interest in establishing the efficacy of transactions which it effects pursuant to its statutory duty as receiver of a national bank. As the Court stated in United States v. Arlington County, 326 F. 2d 929, 932 (4th Cir. 1964):
>
> ' . . . The right of the Federal Government to bring suit to enforce its policies and programs even in the absence of immediate pecuniary interest has been upheld in numerous fields of Federal activity . . . '. I believe the same rule applies to an agency like the FDIC." (A-91)

Arlington has no application here. That was a suit brought by the government itself to have local personal property taxes declared void as conflicting with benefits conferred on members of the armed forces by the Soldiers and Sailors Civil Relief Act. It involved the exercise of sovereign power and governmental policy. In FDIC v Sumner also relied on by the plaintiff, FDIC was suing in its own right (not as receiver) to restrain a violation of a regulation it was expressly empowered to make. These situations

are a far cry from the attempt here by FDIC as receiver, to enjoin a landlord from enforcing her private legal rights under a ground lease (not part of the assets in the hands of FDIC as receiver) against her tenant who happens to be the landlord of a branch bank, because the so-called "public interest" requires a branch bank in the area. This action is particularly oppressive, when there is nothing to show that the landlord of the branch bank will permit it to remain in the building, in spite of the FDIC's desires and intentions. (A-79).

There is no actual case or controversy between the receiver and the defendant Grella

To sustain its right to obtain a declaratory judgment, the receiver must show that there exists a ripe controversy between it and the defendant Grella. The receiver cannot rest its claim on the alleged rights or interests of third persons such as Lever, or European-American Bank, or even the public.

Warth v. Seldin, 422 U.S. 490
95 S.Ct. 2197, 2205

Caplin v. Marine Midland, 406 U.S. 416
92 S.Ct. 1678, 1685, 1686

No. Carolina v. Rice, 404 U.S. 187
92 S.Ct. 402, 404

O'Shea v. Littleton, 414 U.S. 488,493.494
94 S.Ct. 669,675,680

F.D.I.C., as receiver, has utterly failed to show the existence of any actual substantial controversy between it and Grella over the ground lease, or any immediate danger of the F.D.I.C. or the insolvent bank sustaining some direct injury as a result of Grella's action. The conjectural and hypothetical allegations of possible claims in the pape and the opinion below are not enough.

28 U.S.C. §2201

O'Shea v. Littleton, 414 U.S. 488,493,494
94 S.Ct. 669,675,680

Ellis v. Dyson, _____U.S._____
95 S.Ct. 1691,1695

Simon v. Eastern Kentucky W.R.O.___U.S.___
96 S.Ct. 1917, 1924

Either the absence of standing, or the absence of a case or controversy, will prevent a federal court from acting in any suit before it. Of course, absence of standing ipso facto means absence of a case or controversy.

O'Shea v. Littleton, 414 U.S. 488,493,494
94 S.Ct. 669,675,680

Schlessinger v. Reservists Committee, 418U.S.208
94 S.Ct. 2925,2929

International Longshoremen's etc. v. Boyd
347 U.S. 222,223
74 S.Ct. 447,448

The statutes do not confer jurisdiction on the court by legilative fiat where the F.D.I.C. is suing only as a receiver

F.D.I.C. attempted to justify its standing to bring this declaratory judgment and injunction suit involving only New York State real property law and rights by alleging in paragraph 1 of the complaint that it is expressly authorized by Congress to sue (12 U.S.C. §1819), and in paragraph 5 that the controversy arises under the laws of the United States, specifically 12 U.S.C. §§1819 and 1821(c), and that the Court had jurisdiction over the subject matter by

virtue of 12 U.S.C. §1819, and 28 U.S.C. §§1331, 1345 and 1348 (A1,1-a). The court below found forum jurisdiction on these grounds. (A-92).

The statutes cited are inapposite.

There must be a clear distinction drawn between the F.D.I.C. pursuing its functions per se, and its acts as a receiver of a defunct national bank. The corporation was created by Title 12 §1811 of the USCA to insure the deposits of all banks entitled thereto. By Title 12 §1819 it became a corporation on June 16, 1933, and was empowered by paragraph Fourth of that section:

> "Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; * * * *."

This means when the corporation is suing or being sued in its corporate capacity in connection with the exercise of its per se corporate functions, and is a jurisdictional grant.

On the other hand, by subdivision Fourth

of Title 12, §24, a national bank (created by statute 70 years before FDIC was formed) is empowered:

> "To sue and be sued, complain or defend, in any court of law and equity, as fully as natural persons."

By §94 of Title 12, these suits may be instituted in any district court within the district in which the bank is established, or in any State court in the county in which the bank is located "having jurisdiction in similar cases".

This is not a jurisdictional grant, but a venue provision, and jurisdiction of the suit would have to be supported by compliance with other statutory requirements.

Southern Electric Steel Co. v. First National Bank
515 F. 2d 1216

T.P.O. Inc. v. F.D.I.C., 325 F.Supp. 663

As to an insolvent national bank, F.D.I.C. only comes into the picture when the Comptroller of the Currency declares the bank insolvent and appoints a receiver, in which case by the provisions of Title 12, §1821:

"(c) Notwithstanding any other provision of law, 'whenever the Comptroller of the Currency shall appoint a receiver other than a conservator of any insured national bank or insured District bank, or of any non-insured bank or District bank hereafter closed, he shall appoint the Corporation receiver for such closed bank.* * * * * With respect to any such closed bank, the Corporation as such receiver shall have all the rights, powers, and privileges now possessed by or hereafter granted by law to a receiver of a national bank or District bank * * * *"

The F.D.I.C. as receiver in this action stands in the same position as the defunct bank in meeting jurisdictional requirements.

T.P.O. Inc. v. F.D.I.C., 325 F.Supp.663

Landy v. F.D.I.C., 486 F. 2d. 139
cert. den. 416 U.S. 960

Nowhere in 12 U.S.C., or in 28 U.S.C., is the plaintiff as receiver given any powers to sue or be sued in any circumstance where the defunct bank would not be able to do so. No magical powers are granted to a receiver. Because, as we have shown, the ground lease was no part of the assets of the bank (which had irrevocably parted with all interest in it

more than ten years ago), the bank would have no right to bring this action, and a fortiori, neither would its receiver.

Poe v. Ullman, 367 U.S. 497,503,504
81 S.Ct. 1752, 1756

Caplin v. Marine Midland, 406 U.S. 416,426,429
92 S.Ct. 1678,1685,1686

In Caplin a trustee under Chapter X, brought suit against an indenture trustee for its failure to fulfill its obligations to the bondholders of the debtor. The Court held that the plaintiff had no standing to assert claims on behalf of the bondholders, saying in 92 S.Ct. at page 1685:

> "Nor is there anything in 11 U.S.C. §110 set forth in relevant part in footnote 14, supra, that gives him this authority. His task is simply to 'collect and reduce to money the property of the estates for which (he is trustee)'. 11 U.S.C. §75.
>
> The only support petitioner finds in the relevant statutes is in that portion of 11 U.S.C. §587 which gives reorganization trustees the additional rights that a 'receiver in equity would have if appointed by a court of the United States for the property of the debtor'. Petitioner relies on McCandless v. Furland, 296 U.S. 140, 56 S.Ct. 41, 80 L.Ed. 121 (1935), to support the proposition that a receiver in equity may sue third parties on behalf of bond-

holders. But, the opinion of the Court by Mr. Justice Cardozo clearly emphasizes that the receiver in that case was suing on behalf of the corporation, not third parties; he was simply stating the same claim that the corporation could have made had it brought suit prior to entering receivership".

In addition to the lack of existence of a substantial controversy between parties having adverse legal interests, relief should not have been granted absent the required jurisdictional monetary amount, and (since there was no diversity) the failure of the complaint to present for resolution a substantial Federal question.

28 U.S. Code Ann. §1331; §2201;

Volly v. U.S., 488 F.2d 35;

Golden v. Zwickler, 394 U.S. 103
89 S. Ct. 956;

Skelly Oil Co. v. Phillips Pete.
339 U.S. 667, 70 S.Ct. 876;

Marcus Brown Holding Co. v. Pollak
272 F. 137;

Giancana v. Johnson, 335 F. 2d 366
cert. den. 379 U.S. 1001

There is no monetary amount involved in this action, although the plaintiff took pains to

allege the statutory amount (A-1-a). Plaintiff asked for no damages, and in fact could recover none. No monetary value can be put on the attempt to declare rights in a contract in which the plaintiff and its insolvent estate had no interest whatever (the ground-lease). Neither can a value be placed on the attempt by the plaintiff to restrain defendant Grella from pursuing her rights in the ground-lease, merely because the plaintiff and its insolvent estate have an interest in the branch lease, (under which there is no privity of contract or estate with the defendant Grella) on which she makes no claim.

Stewart v. Long Island R.R. Co., 102 N.Y.601;607;

Century Paramount Hotel v. Rockland Corp. 68 Misc. 2d 603, 327 N.Y.S. 2d 695, 700;

Times Square Imp. Co. v. McCreery, 182 App.Div. 653, 169 N.Y.S. 536, aff'd. 228 N.Y. 597

There is no substantial Federal question, in fact no Federal question at all, involved in this suit. All the questions involved are governed by the New York law of real property, landlord and tenant

relationships, and contract. Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 1898. There is no Federal statute or law which controls the rights of the parties under the ground-lease, or for that matter the branch-lease, and there is no allegation of the violation of the Federal Constitution or any Federal statute or law by the defendant.

There was therefore no subject matter jurisdiction.

Thiokol Chem. Corp. v. Burlington Industries
448 F. 2d 328, cert. den. 404 U.S. 1019;

Philips Pete Co. v. Texaco, 415 U.S. 125
94 S.Ct. 1002;

Warrington Sewer Co. v. Tracy, 463 F.2d 771.

In Philips, the court said in 94 S. Ct. at 1003 and 1004:

> "*** It is conceded that there is no diversity of citizenship between the parties. Accordingly, Texaco relied, as the basis for federal jurisdiction, on 28 U.S.C. §1331(a), asserting that its claim '[arose] under the Constitution laws, or treaties of the United States.' Philips moved to dismiss for want of federal jurisdiction of the subject matter. The District Court granted this motion and Texaco appealed to the Court of Appeals

> for the Tenth Circuit, which by a divided vote reversed the District Court's determination that federal jurisdiction was lacking."
> "*** This Court has repeatedly held that, in order for a claim to 'arise' ''under the Constitution, laws, or treaties of the United States,' '' ''a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action.' Gully v. First National Bank in Meridian, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936). The federal questions 'must be disclosed upon the face of the complaint, unaided by the answer.' ".
> "*** Under the settled precedent of our past decisions noted above, it thus cannot be said that this suit 'arises under the Constitution, laws, or treaties of the United States.' Accordingly, there is no federal jurisdiction under 28 U.S.C. §1331(a)."

We have shown already that the provisions of 12 U.S.C. 1819 do not overcome or satisfy the above two jurisdictional requirements, because F.D.I.C. is not proceeding here per se, but as the receiver of a defunct National Bank.

Based on all the foregoing, we submit that the plaintiff as receiver had no standing to sue, that there is no ripe controversy between the receiver and Grella presenting for determination a substantial federal question, that the court lacked subject matter

jurisdiction, and that the declaration and the permanent injunction were improperly granted.

Point II

If the jurisdictional objections raised in Point I above are not valid, the court below nevertheless should have denied summary judgment to the plaintiff and granted it to the defendant Grella

It goes without saying that the issue presented for determination by F.D.I.C. as receiver, involving as it does only questions of real property law, or real property contract law, should have been decided, if at all, according to the law of the State of New York, and not federal law, statute or case.

28 U.S.C. §1652

Mitchell v. W. T. Grant Co., 416 U.S. 600
94 S. Ct. 1895, 1898

Jewell v. Davies, 192 F2d 670, cert. den.
343 U.S. 904, 72 S. Ct. 635

Stricker v. Morgan, 158 F.Supp. 830 Af. 268
F2d 882, cert. den. 361 U.S. 963
80 S. Ct. 592

"*** despite repeated statements implying the contrary, it is the source of the right sued upon,

and not the ground on which federal jurisdiction over the case is founded, which determines the governing law *** Thus, the Erie doctrine applies, whatever the ground for federal jurisdiction, to any issue or claim which has its source in state law. See, e.g., Rothenberg v. H. Rothstein & Sons, 3 Cir. 1950, 183 F2d 524, 21 ALR2d 832. Cf. Wichita Royalty Co. v. City National Bank, 1939, 306 US 103,107,59 S Ct 420, 83 L ed 515." (Maternally Yours v. Your Maternity Shop, 234 F2d 538)

New York law does not shirk at enforcing a forfeiture provision in a lease absent any fraud or bad faith on the part of the landlord which induced the breach, or the absence of a factual insolvency or bankruptcy, (something not remotely suggested here). The strict enforcement of a forfeiture clause is not halted or softened by the possible harsh results to the tenant defaulting, or to others.

W.F.M. Restaurant, Inc. v. Austein
35 N.Y. 2d 610, 364 N.Y.S. 2d 500

First National Stores v. Yellowstone Shopping Center - 21 N.Y. 2d 630, 637

Weinfield Holding Corp. v. Pless & Seeman
257 N.Y. 536

Graf v. Hope Building Corp.
254 N.Y. 1, 70 ALR 984

In WFM Restaurant, Inc., supra, by Breitel, C.J., the New York Court of Appeals held in affirming the termination of a lease under a bankruptcy clause:

> "There should be an affirmance. In the absence of fraud, collusion, or overreaching exploitation by landlord of an improper or unjustified bankruptcy petition, judicial intervention to undo the effect of the bankruptcy clause would be without warrant in law or equity."

In First National Stores, above, the landlord made a demand on the tenant for action as permitted by the lease, the latter failed to comply, and a default notice and termination notice followed. The Appellate Division found for the tenant, vacating the notice and basing its holding upon the tenant's apparent good faith in attempting to comply with the landlord's demand. The Court of Appeals reversed, stating in 21 N.Y. 2d at pages 637-638:

> "The sympathetic attitude of the majority below is understandable, but must be rejected. Article Twelfth of the lease, which gives the landlord the right to terminate after a 10-day notice of default, is neither harsh nor inequitable; a landlord's right to terminate a lease based upon a

tenant's breach of his covenant is commonplace****"

"Should we hold that the termination of this lease is harsh and inequitable, then the same conclusion can be reached in every instance where a landlord exercises his contractural rights, and in that event, the right of terminating or any other right specified in a lease would be rendered meaningless and ineffectual (cf. Matter of Feist & Feist v. Long Is. Studios, 29 A.D. 2d 186)."

The receiver asserts among other things, that the lease is to be construed strictly against the landlord. This is not a correct statement of New York or federal law. A lease is to be construed strictly against the draftsman thereof -- not the landlord unless he was the draftsman. In this case the lease was drawn by the tenant.

Rentways Inc. v. O'Neill Milk & Cream Co.
308 N.Y. 342, 348

Fabulous Stationers v. Regency
44 A.D. 2d. 547, 353 N.Y.S. 2d. 766

The federal rule is no different.

Finn v. Meighan, 325 U.S. 300

Modell Dairy Corp. v. Foltes-Fischer, Inc.
67 F 2d 704, 706

B.M.J. Realty Corp. v. Ruggieri
326 F 2d 281

The court below has found that the language of the default clause is not ambiguous, but that it does not specifically refer to a declaration of insolvency by the Comptroller of the Currency, and hence, although the tenant is absolutely insolvent, that insolvency cannot be considered as a default under the lease. This is a play upon words. The default clause is the standard printed Gilsey form clause which has been used in New York for many years. Its purpose clearly is to allow a termination whenever the tenant who is obligated to the landlord becomes insolvent, however that happens.

The court has found correctly that the tenant r.. ..ed to in the clause is F.N.B., but in interpreting the clause, the court confined itself to the language of the clause alone.

The court should have addressed itself to the entire lease, not just the default clause, in order to arrive at the meaning of the clause. Like a provision in any other contract, it should be construed

in the light of the circumstances existing when the agreement was made, and the apparent purpose of the parties in inserting the proviso. The specific words used may not with complete certainty declare the intentions of the parties which are apparent in the purpose, and in that event the court must correct the inaccuracy or supply the omissions. This is particularly true when a strict interpretation results in an apparent absurdity.

Duttweiler v. Jacobs, 223 A.D. 292

Aron v. Gillman, 309 N.Y. 157

Indovision Enterprises v. Cardinal Export
44 A.D. 2d 228

Burgener v. O'Halloran, 111 Misc. 203, 181 N.Y.S. 235, 238 where the Appellate Term said:

"*** Any other construction would be repugnant to common sense. There are many cases in the books, but none that I can find with the precise phraseology of this case; the decisions of the court, however, as I read them, are to the effect that, whatever ambiguity there may be in the words of the covenant, the intention of the parties absolutely must prevail, and this, even though the intention of the parties is in opposition to the strict letter of the contract, when

such intention is clearly ascertained. As courts have said in construing certain of these covenants, more apt language might have been used; but the intent is clear and must prevail. See Tracy v. Albany Exchange, 7, N.Y. 472, 57 Am. Dec. 538; Crawford v. Kastner, 26 Hun, 440; Mack v. Patchin, 29 How. Prac. 20; Western Transportation Co. v. Lansing, 49 N.Y. 499; Western New York v. Rea, 83 App. Div. 576, 81 N.Y. Supp. 1093; House v. Burr, 24 Barb. 525."

The federal rule is no different.

Eskimo Pie Corp. v. Whitelawn Dairies
284 F. Supp., 987, 993, 994, where it was declared:

"An 'ambiguous' word or phrase is one capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business. Fox Film Corp. v. Springer, 273 N.Y. 434, 8 N.E. 2d 23 (1937); Rochester Park, Inc. v. City of Rochester, 19 A.D. 2d 776, 241 N.Y.S. 2d 763 (4th Dept. 1963)"

The expressions in the ground lease of the forms in which the insolvency of the tenant might be manifested were an attempt to state the general notion of the only ways in which an insolvency would become apparent. True it is that a national bank cannot file a petition in bankruptcy or have a petition filed against it. Grella, an unsophisticated housewife, was

not supposed to know that. But Franklin knew or should have known it, and the lease was drawn by Franklin's attorney. The insolvency of Franklin might occur in many ways. The simple inability to pay debts when due is insolvency. The insolvency might be declared (and was) by the Comptroller of the Currency. Any doubt that this declaration was one of the indications of the tenant's insolvency triggering action by the landlord should be construed strictly against Franklin, and that event deemed written into the lease.

In Finn v. Meighan, cited above, the Supreme Court stated in 325 U.S. at p. 303:

> "Thus we must read §70, sub. b, as providing that an express covenant is enforceable which allows the lessor to terminate the lease if a petition to reorganize the lessee under Ch. X is approved. Cf. In re Walker, 2 Cir., 93 F.2d 281. That being the policy adopted by Congress, our duty is to enforce it.
>
> The question remains whether this lease should be so construed. There is to be a forfeiture "if the tenant shall be adjudged bankrupt or insolvent by any Court." It is said that 'insolvent' is used interchangeably with 'bankrupt'. But it has long been held

> that a general assignment is an act of bankruptcy whether or not the debtor is insolvent. West Co. v. Lea, 174 U.S. 590, 19 S.Ct. 836, 43 L.Ed. 1098. Thus it would seem that 'adjudged bankrupt' and 'adjudged insolvent' do not cover precisely the same ground. Moreover, insolvency in the equity sense has always meant an inability of the debtor to pay his debts as they mature. Under the Bankruptcy Act it means an insufficiency of assets at a fair valuation to pay the debts. § 1(19), 11 U.S.C. § 1(19), 11 U.S.C.A. § 1(19). It was long the practice to initiate reorganizations in the federal equity courts by the filing of a general creditor's bill which alleged insolvency in the equity sense. There would accordingly seem to be no doubt that if a receiver were appointed pursuant to such a bill, it would bring into operation an express covenant providing for a forfeiture of a lease 'if the tenant shall be adjudged insolvent by any Court.' No reason is apparent why the same result should not obtain in cases of reorganization under Ch. X."

Finn would have mandated a reversal of In re Imperial "400" National, Inc., 429 F.2d 680, cited by the court below (A-94), if it had gone up. Furthermore, when a New York bank is taken over by the Superintendent of Banks, that act is the same as the appointment of a receiver within the meaning of a termination clause. In Ruppert Realty Corp. v. Bank of United States, 156 Misc 93, 281 N.Y.S. 761, af. 249 App. Div. 721, 292 N.Y.S.

997, af. 276 N.Y. 629, it was said in 281 N.Y.S. at page 767:

> "the defendants contend that the conditions of default in paragraph 1 authorizing the notice had not occurred. Within the meaning of the termination clause, the superintendent is taken to be a receiver. In re Union Bank of Brooklyn, 204 N.Y. 313, 316; Yokohama Specie Bank Ltd. vs Chinese Merchants Bank, 219 App. Div. 256, 258, 219 N.Y.S. 732; Lafayette Trust Co. v Beggs, 213 N.Y. 280, 284."

An examination of the whole lease, and the commitment letter (A-9, A-39) shows clearly that the tenant referred to in the default clause was F.N.B. (and the court below has necessarily so found); that the default clause drawn by F.N.B. was an attempt to protect Grella in the event of the insolvency of F.N.B. (the only tenant contractually liable to Grella) however that insolvency came about; and that since F.N.B. was declared insolvent, the default clause became operative and permitted cancellation of the lease by Grella at her option. That is the law in New York.

Gillette Bros. v. Aristocrat Restaurant
239 N.Y. 87, 91, 92

Sixth Ave. Realty v. N. Zeiler & Co.
156 N.Y.S. 372, 373

In applying the foregoing rules of construction to the lease here, one must come to the conclusion that the parties to the ground lease by their references to "bankruptcy", "arrangement", "assignment for the benefit of creditors" and "insolvency" intended that any failure of Franklin however occurring, would be a default. It is submitted therefore that a proper reasonable construction of the lease mandated a finding that Franklin defaulted, and Grella was entitled to terminate.

Conclusion

The case should be remanded for dismissal and vacation of the injunction on the grounds that the plaintiff as receiver lacked standing to sue and that the court lacked subject matter jurisdiction, or the summary declaratory judgment should

be reversed and granted in favor of defendant Grella holding that the declaration of insolvency of Franklin National Bank was a default under the lease and the termination notice based on it valid, and the permanent injunction in any case should be vacated, with costs.

Respectfully submitted,

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James J. Milligan
of counsel

Service of three Copies of the within
is admitted this 15th day of October 1976

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3 copies received - 10/15/76
Hughes Hubbard & Reed
Attorneys for Plaintiff-Appellee
SLT